

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL No. 875 of 1989****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG****HONOURABLE MR.JUSTICE K.M.MEHTA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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STATE OF GUJARAT - Appellant(s)
Versus
R. ENGINEER - Defendant(s)

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Appearance :

GOVERNMENT PLEADER for Appellant(s) : 1,
MRS KETTY A MEHTA for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 20/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

The present is an appeal under Section 39 of the

Arbitration Act, 1940 read with Section 96 of the Civil Procedure Code against judgement and decree dated 10.2.1989 passed in Special Civil Suit No. 190 of 1988 (Exh. 22) by the learned Civil Judge (S.D.), Ahmedabad (Rural) at Mirzapur, Ahmedabad, rejecting the objections filed by the present appellant against the award made and ultimately published on 24.12.1987.

The facts necessary for disposal of the present matter are that the respondent contractor was awarded some earth work and lining for canal off taking from LBMC channel 0 to 10,000 metres as per agreement No. B2/2 of 1981-82. During the execution of the work various disputes arose which required settlement through arbitration. The estimated cost of the work was Rs. 19,10,704/- while the tender cost was Rs. 20,09,127/-. The work was to be completed within 24 months from the issuance of the work order. However, the work could not be completed within the stipulated time, extension was granted, ultimately the contract was terminated on 19.4.1984. According to the appellant, the contractor submitted his claim and demanded arbitration vide his letter dated 26.6.1984. However, according to the respondent such demand was made on 1.9.1984. According to clause 52 of the Agreement, the respondent was to respond

immediately and in case of his failure, the contractor was authorised under law to send panel of arbitrators for selection of one by the respondent Chief Engineer and in case of further failure on the part of the Chief Engineer, the contractor was entitled to appoint one single arbitrator to arbitrate upon the dispute.

According to the contractor despite letter dated 1.7.1984 the Chief Engineer did not do anything nor sent the list of arbitrators for selection of one by the arbitrator, by his letter dated 12.12.1984 the contractor sent the list of names and by his further letter dated 5.3.1985 a list of 5 more arbitrators was given by the contractor to the Chief Engineer for appointment. As the Chief Engineer failed in appointing arbitrator or selecting one out of the list, the contractor appointed sole arbitrator on 8.4.1985, to this appointment the Superintending Engineer objected but however on 23.5.1985 the arbitrator entered into the reference and conducted the preliminary meeting. Thereafter, certain notices were issued by the arbitrator to the department but the Superintending Engineer refused to participate in the matter. Ultimately, on 21.11.1987 the arbitrator observed that he may publish the award which was accordingly published on 24.12.1987.

After the award was made and published by the arbitrator, the contractor/respondent made an application under Section 17 of the Arbitration Act requesting the Court that the award be made rule of the Court. The appellant raised various objections under Sections 30/33 of the Arbitration Act, 1940, the learned trial Court after hearing the parties, rejected the objections, being dissatisfied and aggrieved by the rejection of their objections and making the award rule of the Court, the appellant State before this Court in this appeal.

The learned counsel for the appellant State submits that clause 52 which authorises the parties to refer the matter to the arbitration was not observed in its true spirit and as within the period prescribed under clause 52 the contractor did not take action he lost his right to refer the matter to the sole arbitrator of his choice. His further submission is that in view of the specific conditions, a specific term contained in clause 52, the arbitrator would not make lumpsum award nor he could grant anything in favour of the contractor without assigning his reasons for the same.

It is vehemently contended that the arbitrator's appointment being contrary to clause 52, the arbitrator

had no jurisdiction to enter into reference and arbiter into the dispute and in any case the Court below could not, contrary to clause 52, hold that the lumpsum award was maintainable.

Ms. Ketty A. Mehta, learned counsel for the respondent submitted that any lapse on the part of the Chief Engineer in not responding to the notice would clothe the contractor with jurisdiction to appoint an arbitrator and as the contractor has exercised his rights conferred upon him under clause 52, at this stage the appellant cannot say that appointment of the arbitrator was bad. It was also contended that the question about non-supply of the reasons at the end of the arbitrator was not raised before the Court below. Therefore, the appellant cannot be allowed to raise that question.

We have heard the parties at length and perused the records. For due appreciation of the arguments of the parties, we must refer to clause 52 of the agreement which refers to arbitration which reads as under:

"52 - Arbitration

All disputes or differences in respect of which the decision has not been final and conclusive shall be

referred for arbitration appointed as follows:

Within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration the Chief Engineer Irrigation Project shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The Contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of one officer from the list who shall then be appointed as the sole arbitrator. If Contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within thirty days as stipulated, the Contractor shall send a similar list to the Chief Engineer within fifteen days. The Chief Engineer shall then select one officer from the list and appoint him as the sole arbitrator within fifty days. If the Chief Engineer fails to do so the Contractor shall communicate to the Chief Engineer the name of one officer from the list, who shall

then be the sole arbitrator.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the arbitrator shall be final and binding on the parties thereto. The arbitrator shall determine the amount of costs of arbitration to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor shall not be withheld unless they are subject matter of the arbitration proceedings.

All awards shall be in writing and in case of awards amounting to Rs. 1.00 lakh and above such awards shall state the reasons for the amount awarded.

Neither party is entitled to bring a claim to arbitration if the arbitrator has not been appointed before the expiration of thirty days after defect liability period."

A fair understanding of clause 52 would show that in case of a dispute the contractor has to refer the matter to the Chief Engineer who in his turn within thirty days shall send list of the arbitrators to the contractor and the contractor in his turn within 15 days from the receipt of the list shall opt for one arbitrator, on exercising his option he shall refer the name to the Chief Engineer and the Chief Engineer shall appoint such person as the sole arbitrator. In case the contractor fails to respond within fifteen days then the Chief Engineer shall be entitled to refer the matter to the sole arbitrator of his own choice. In case the Chief Engineer fails to respond within thirty days from the date of the demand, within fifteen days next the contractor would be entitled to send a similar list to the Chief Engineer and the Chief Engineer within fifty days of the receipt of the list shall opt for one arbitrator. In case the Chief Engineer fails in selecting one name then the contractor shall be entitled to select one man and refer the said name to the Chief Engineer informing him that such person shall act as a sole arbitrator.

In the present case the demand was made either on 26.6.1984 or on 1.7.1984, the Chief Engineer was supposed

to respond within one month and in case of his failure within fifteen days further the contractor could send a list of arbitrators. If the letter was sent on 1.7.1984, on or before 1.8.1984 the Chief Engineer was to respond and on his failure within fifteen days next i.e. latest by 16/17.8.1984 the petitioner was to send the list. In the present matter on failure of the Chief Engineer the contractor sent the list on 12.12.1984 i.e. almost after four months of the end of the period. It is further to be seen that the contractor sent yet another list of five persons on 5.3.1985 and thereafter appointed the sole arbitrator on 8.4.1985.

When clause 52 provides for a complete scheme for appointment of an arbitrator either by the Chief Engineer or by the contractor in case failure on the part of the Chief Engineer then the clause has to be applied in toto and one cannot be allowed to say that the right to appoint the arbitrator was unfettered and could be exercised at any point of time. If the failure on the part of the Chief Engineer could confer jurisdiction or authority on the contractor who sends list of his own arbitrators or appoints his own arbitrator within a particular time, then failure on the part of the contractor to carry out the spirit of the arbitration

clause within the time would deprive him of his right to appoint the sole arbitrator. If non-action within the period provided under clause 52 deprives the Chief Engineer from exercising his authority then non-action on the part of the contractor within the period stipulated under clause 52 would also deprive him from exercising his authority. In the instant case we must observe that appointment of sole arbitrator by the contractor beyond 45 days of the demand was absolutely illegal and was also contrary to clause 52 of the agreement.

It is well settled law that if appointment of an arbitrator is not valid or legal or as per the terms and conditions, the award is without jurisdiction. Where agreement provides for an appointment of an arbitrator and before such procedure is completed and appointment of arbitrator is made and before that the arbitrator enters upon the reference, the reference cannot be proceeded and the award will be bad.

The agreement provides that all awards shall be in writing and in case of awards amounting to Rs. 1.00 lakh and above, such awards shall state the reasons for the amount awarded. In the instant case, according to the appellant the award sans reasons though it is more than Rs. 1.00 lakh and consequently is bad, the submission of

the other side that the question was not raised before the learned Court below.

A fair understanding of the arguments summarised by the learned Court below would clearly show that the question was so raised but the Court below went on deciding the question in a different perspective observing that the question of lumpsum award was raised.

In absence of any cognate terms set between the parties under the old Act, 1940 and arbitrator or panel of the arbitrators or umpire were not required to give detailed reasons in support of their award. The law clearly provides that if there is an understanding between the parties or arbitrator agreement clearly provides that the award shall contain reasons then the terms contained in the arbitration agreement shall bind the arbitrator and he would be obliged to provide reasons in support of the award.

In the matter of RAIPUR DEVELOPMENT AUTHORITY VS. M/S. CHOKHAMAL CONTRACTORS reported in AIR 1990 SC 1426 the Supreme Court clearly observed that an award passed under the Arbitration Act is not liable to be remitted or set aside merely on the ground that no reasons have been

given in its support except where the arbitration agreement or the deed of submission or an order made by the Court such as the one under Section 20 or Section 21 or Section 34 of the Act or the statute governing the arbitration requires that the arbitrator or the umpire should give reasons for the award. As there was a specific term set between the parties that in relation to awards amounting to Rs. 1 lakh and above the arbitrator shall give specific reasons and as no reasons have been given by the arbitrator in support of the award in view of the Constitution Bench judgement of the Supreme Court in the matter of Raipur Development Authority Vs. M/s. Chokhamal Contractors (supra) the award cannot be allowed to stand.

To summarize we must hold that the appointment of the arbitrator was contrary to clause 52 of the agreement and the award made by the arbitrator was contrary to clause 52 of the agreement. The learned Court below, in our considered opinion, erred in not appreciating the arguments presented in their right perspective and committed a manifest illegality in making the award rule of the Court. For the above reasons, the appeal deserves to be and is accordingly allowed. The judgement and decree made by the Court below are set aside and the award made

by the arbitrator published on 24.12.1987 is also set aside and for the reasons aforesaid all the proceedings before the arbitrator are quashed. No order as to costs.

It will not be out of place at this stage to mention that even Section 31 of the New Arbitration and Conciliation Act, 1996 provides form and contents of arbitral award as follows:

"S. 31 - Form and contents of arbitral award - (1)
An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) xxxxxxxx

(3) The arbitral award shall state the reasons upon which it is based unless:

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under Section 30."

Therefore, new Section 31 also provides that normally arbitrator shall state reasons upon which it is based unless parties have agreed that no reasons are to be given. This Section also considers the constitution

bench judgement of the Supreme Court. This Section also supports the conclusion that the arbitrator should normally give reasons unless parties have agreed that no reasons should be given. In this case the parties have agreed that the arbitrator has to give reasons where the arbitrator has not given reasons and therefore on additional ground also the award of the arbitrator is liable to be set aside.

In accordance with the interim directions issued by this Court, the appellant has deposited the amount decreed in favour of the respondent and the same was withdrawn by the respondent. As we are setting aside the judgement and decree, the respondent would be obliged to refund the amount in terms of the interim order. In case the respondent does not refund the amount within 30 days from today, the State would be entitled to take appropriate action for recovery of the said amount or decree in terms of the judgement.

(R.S. GARG, J)

(K.M. MEHTA, J)

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